University of Michigan Journal of Law Reform

Volume 17

1984

Action Accrual Date for Written Warranties to Repair: Date of Delivery or Date of Failure to Repair?

Carey A. DeWitt
University of Michigan Law School

ACTION ACCRUAL DATE FOR WRITTEN WARRANTIES TO REPAIR: DATE OF DELIVERY OR DATE OF FAILURE TO REPAIR?

Written warranties are commonly offered in sales transactions, especially those involving durable goods such as appliances, tools, and automobiles. Such warranties frequently contain provisions in which the seller promises to repair or replace the goods should they prove defective within a specified period (repair provision). In an informal survey,[1] approximately ninety-six percent of written warranties examined contained a repair provision and thus were "repair warranties." In addition, about half of the warranties examined made no promise regarding the condition of the goods or stated that repair was the seller's sole obligation (sole repair warranty).[2]

The Uniform Commercial Code establishes the period during which a buyer with a warranty claim must sue. Under Code section 2-725,[3]

1. In this survey, 56 warranties were examined. There is no guarantee that these warranties are representative of the full range of warranties in the market today. This group does, however, include many warranties offered to the average consumer. Warranties from 16 product categories were examined, including sporting goods, automobiles, watches, kitchen utensils, pens, electronic games, shoes, calculators, small, medium, and large sized appliances, tools, cameras, lawn mowers, typewriters, cosmetics, plumbing implements, and mattresses.

2. For example, Sears, the nation's number one retailer, *see Corporate Scoreboard*, BUS. WK., March 14, 1983, at 65, 86 (1982 sales), and General Motors, the world's largest auto maker, *see How the G.M. Toyota deal buys time*, BUS. WK., Feb. 28, 1983, at 32, have apparently uniformly adopted sole repair warranties for their products. (Sears warranty information is limited to Sears brand products.)

Other findings as to the frequency of certain warranty characteristics:

(1) Approximately 70% (39/56) of warranties examined contained a provision promising that the product was free from defects (no-defects provision).

(2) Approximately 17% (6/35) of warranties containing both a no-defects provision and a repair provision (dual warranties) contained a time limitation only in the repair provision.

(3) Approximately 57% (32/56) of warranties examined had at least one of the two following characteristics: (a) contained a time term only in the repair provision; (b) were sole warranties to repair.

(4) Approximately 70% (26/37) of warranties examined contained a disclaimer of seller's responsibility for product failure due to abuse or misuse.

For formal compilations of the frequency of some warranty characteristics including, inter alia, warranty period duration, damages exclusions, limitations on implied warranties, and limitations on transferability, see generally Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981); Gerner & Bryant, *Appliance Warranties as a Market Signal?*, 15 J. CONSUMER AFF. 75 (1981); Note, *An Empirical Study of the Magnuson-Moss Warranty Act*, 31 STAN. L. REV. 1117 (1979).

3. The language of U.C.C. § 2-725, in relevant part, is as follows:

(1) An action for breach of any contract for sale must be commenced within four

the limitations period for warranty actions (and for actions on contracts for the sale of goods generally) is four years. If the warranty is a simple promise that the goods are free from defects (no-defects warranty), this four-year period begins on the date the goods are delivered. The limitations period may begin at a different time, however, if the warranty contains a repair provision, especially where there is no promise that the goods are not defective.[4]

This Note argues that the statute of limitations for an action for breach of a repair warranty should begin to run not when the goods are delivered (on-delivery rule), but when the manufacturer has failed to repair the goods (failure-to-repair rule). Part I considers the current division of authority relating to the action accrual date (the date at which the limitations period begins) for repair warranties. It analyzes the issue of whether the repair warranty is a species of future performance warranty under section 2-725(2) and examines non-Code law on repair promises. Part II discusses the advantages and disadvantages of allowing the statute of limitations to begin running only after the manufacturer has failed to repair. Part III concludes that a failure-to-repair rule best serves the purposes of the Code's rules regarding prospective warranties (those that promise performance at a future time) and proposes an amendment to section 2-725 to this end.[5]

---

years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to the future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

4. Typical of a sole repair warranty might be this provision:

For one year from date of purchase, when this Air Conditioner is operated and maintained for normal room cooling according to owner's instructions attached to or furnished with the product, [Manufacturer] will repair this Air Conditioner free of charge, if defective in material or workmanship.

A dual warranty promising both that the product was not defective and that it would be repaired if it were found to be defective might be as follows:

All parts of the [Manufacturer's] faucet are warranted to the original consumer purchaser to be free from defects in material and workmanship for a period of five years from the date of purchase. [Manufacturer] will replace, free of charge, during the warranty period, any part which proves defective in material and/or workmanship under normal installation, use, and service. THIS WARRANTY IS LIMITED TO DEFECTIVE PARTS REPLACEMENT ONLY. LABOR CHARGES AND/OR DAMAGE INCURRED IN INSTALLATION, REPAIR, OR REPLACEMENT AS WELL AS INCIDENTAL AND CONSEQUENTIAL DAMAGES CONNECTED THEREWITH ARE EXCLUDED. Any damage to this faucet as a result of misuse, abuse, neglect, accident, improper installation, or any use violative of instructions furnished by us, WILL VOID THE WARRANTY.

5. This analysis does not consider the action accrual date for implied warranties. In almost all cases involving implied warranties the action is held to accrue at the date of delivery. *See, e.g.*, Clark v. De Laval Separator Corp, 639 F.2d 1320, 1325 (5th Cir. 1981); Holdridge v. Heyer-

I. THE CURRENT CONFUSION REGARDING THE ACTION ACCRUAL DATE FOR BREACH OF A REPAIR WARRANTY

Courts applying the Uniform Commercial Code and courts looking beyond Code language have addressed the issue of when the statute of limitations should begin to run on an action for breach of a repair warranty. Cases applying the Code language generally construe a repair provision as a limitation of remedies for breach of warranty but fail to address adequately the question of when, given such a construction, the limitations period should begin. Courts not applying Code language have concluded that breach of a repair warranty occurs only upon the seller's failure to repair and therefore that the statute can begin running only at this point.

A. The Uniform Commercial Code's Answer

The general rule of section 2-725(2) is that an action for breach of warranty accrues on the date of delivery.[6] Under the same subsection, however, the general rule does not apply where a warranty explicitly extends to future performance of the goods and discovery of the breach must await such performance.[7] In such cases, the action accrues when

---

Schulte Corp., 440 F. Supp. 1088, 1103 (N.D.N.Y. 1977) (and cases cited therein); J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 419 n.73 (2d ed. 1980); Annot., 93 A.L.R.3D 690, 692-96 (1979 & Supp. 1983). Moreover, in almost all of the decisions considered here, the parties had contracted for the sale of goods. Contracts for services may be denied Code treatment. *See* H. Hirschfield Sons Co. v. Colt Indus., 107 Mich. App. 720, 724-27, 309 N.W.2d 714, 716-17 (1981); Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262, 275 (D. Maine 1977) (and authorities cited). Thus, if a manufacturer's repair obligation/agreement were viewed as a separate services contract, the Code might be inapplicable. Where services are incidental to the sale of goods, however, U.C.C. § 2-725(2) is applicable. *See* Tele-Radio Sys. Ltd. v. De Forest Elecs., Inc., 92 F.R.D. 371, 374 (D.N.J. 1981) (citing Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 742 (2d Cir. 1979)); *see also* Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 418 N.Y.S.2d 948 (1979). Because a contract for the sale of goods is involved here, the U.C.C. is applicable. Hence, regardless of what the action accrual date is determined to be, the rule in U.C.C. § 2-725(1), quoted *supra* note 3, that actions for breach of contract for the sale of goods must be commenced within four years of the action accrual date is applicable.

6. *See supra* note 3.

7. *Id.* Two commentators have undertaken to analyze judicial treatment (to 1974) of the § 2-725(2) future performance exception with respect to a broad range of arguably prospective warranties, including warranties as to the quality of goods and warranties of title, and have advocated radical changes in the language and sweep of the exception. *See* Schmitt & Hanko, *For Whom the Bell Tolls—An Interpretation of the U.C.C.'s Exception as to Accrual of a Cause of Action for Future Performance Warranties*, 28 ARK. L. REV. 311 (1974). The analytical focus of this Note is much narrower, reaching only warranties that contain repair provisions. In particular, this Note examines the critical issue of construction of the repair provision as a remedy limitation that cannot receive the benefit of the Code's general rule or exception for warranties. This construction is unique to the repair provision and therefore is left entirely unexamined by

the breach is or reasonably should have been discovered.[8]

1. Repair Warranties as Remedy Limitations Incapable of Extending to Future Performance— Because product repair promises are warranties[9] — or are at least labeled as such[10] — application of section 2-725 to repair warranties is facially appropriate. Thus, such warranties may be subject to the section 2-725 action accrual date rules. Moreover, repair promises with specific duration terms are arguably explicit extensions to future performance, and, as such, the statute of limitations may begin to run only after discovery of the breach.[11]

---

the above described work. Moreover, the "Proposal for Revised § 2-725" offered by Schmitt & Hanko, given the prevailing construction of repair provisions as remedies, would not allow such provisions prospective treatment. *See infra* note 115 and accompanying text.

8. *See supra* note 3. Doubtless the issue of when a breach of a repair obligation is "discovered" would often arise if the statute of limitations for such an obligation were held to run at a point later than delivery. Section 2-725(2) requires that where such a warranty explicitly extends to future performance and discovery must await such performance, the action accrues at the date at which the breach is or *reasonably should have been discovered.* The reasonable opportunity for early discovery has been found to be important on several occasions. *See, e.g.*, Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1101 (N.D.N.Y. 1977); Gemini Typographers v. Mergenthaler Linotype Co., 48 A.D.2d 637, 638, 368 N.Y.S.2d 210, 212 (1975); *see also* Voth v. Chrysler Motor Corp., 218 Kan. 644, 648-49, 545 P.2d 371, 376 (1976); Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 984, 433 N.Y.S.2d 888, 889-90 (1980) (Doerr, J., dissenting). When the manufacturer's only obligation is to repair or replace, a reasonable interpretation is that discovery occurs when the manufacturer has clearly failed or refused to repair. This interpretation is consistent with the common law rule that breach of a conditional contract can occur only upon the occurrence of the condition. *See infra* note 91.

9. *See* Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 998, 354 N.Y.S.2d 778, 784, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974) ("a promise to repair is an express warranty that the promise to repair will be honored"), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 821 n.17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

10. A court may well find that a repair provision is not a warranty at all. *See infra* notes 18-33 and accompanying text.

11. In practice, the explicit extension standard has been difficult to meet. Because § 2-725(2) requires that warranties *explicitly* extend to future performance of the goods to be excepted from the on-delivery rule, courts have ruled that "there must be a specific reference to a future time in the warranty. As a result of this harsh construction, most express warranties cannot meet the test." Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 820 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); *accord* Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 870-71 (Wyo. 1980); *see also* R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 823 (8th Cir. 1983); Voth v. Chrysler Motors Corp., 218 Kan. 644, 651, 545 P.2d 371, 377 (1976); Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 172, 253 N.W.2d 696, 697 (1977). In some cases, however, provisions not stating a general time at which future performance will occur have qualified as explicit extensions. *See generally* Annot., 93 A.L.R.3D 690 (1979); Schmitt & Hanko, *supra* note 7. Nevertheless, it has been very clear in many cases that the manufacturer's performance would occur in the future. *See* Rempe v. General Elec. Co., 28 Conn. Supp. 160, 254 A.2d 577 (1969); U.S. Indus. v. Mitchell, 148 Ga. App. 770, 252 S.E.2d 672 (1980); Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 433 N.Y.S.2d 888 (1980); Mittasch v. Seal Lock Burial Vault, Inc., 42 A.D.2d 573, 344 N.Y.S.2d 101 (1973); Perry v. Augustine, 37 Pa. D. & C.2d 416, 3 U.C.C. Rep. Serv. (Callaghan) 735 (Mercer County Ct. C.P. 1965); *see also infra* text accompanying notes 39-54.

Warranties providing merely that a product would function as intended have generally been found insufficiently explicit. *See* Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813,

Nevertheless, several courts have concluded that repair warranties do not explicitly extend to future performance of the goods under Code section 2-725(2) so that the statute of limitations begins to run at delivery.[12] In fact, the Wyoming Supreme Court concluded that the "weight of authority" was such that a warranty to repair should not be found to explicitly extend to future performance under section 2-725(2).[13] In the view of these courts, the section 2-725(2) exception applies only in situations where future performance of the *product* is promised.[14] The exception applies, by its terms, only "where a war-

---

819-20 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1103 (N.D.N.Y. 1977); Nassau Roofing and Sheet Metal Co., Inc. v. Celotex Corp., 74 A.D.2d 679, 681, 424 N.Y.S.2d 786, 788 (1980). Even more detailed warranties specifying precisely what sort of performance can be expected of a product have not been found sufficiently explicit. *See* Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F. Supp. 614, 618 (D. Del. 1977); Binkley Co. v. Teledyne Mid-Am. Corp., 333 F. Supp. 1183, 1186-87 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972); *see also* Homart Dev. Co. v. Graybar Elec. Co., 63 A.D.2d 727, 405 N.Y.S.2d 310 (1978). Some courts holding arguably prospective warranties to be merely present in nature have held that such warranties "constitute a representation of the product's condition at the time of delivery and do not make any reference to future time." *See* Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1103-04 (N.D.N.Y. 1977); Thalrose v. General Motors Corp., 8 U.C.C. Rep. Serv. (Callaghan) 1257, 1258 (N.Y. Sup. Ct. 1971); *see also* Citizens Util. Co. v. American Locomotive Co., 11 N.Y.2d 418, 184 N.E.2d 171, 230 N.Y.S.2d 194 (1962). A promise that a product is "capable" of a given performance, however, is essentially an indication of the condition of the product at the time of delivery. *See* Homart Dev. Co. v. Graybar Elec. Co., 63 A.D.2d 727, 405 N.Y.S.2d 310 (1978). By contrast, the repair promise does not relate to the present condition of the goods. Thus, reliance on this line of authority is misplaced where a repair warranty is involved.

12. *See* Hansen v. F.M.C. Corp., 32 U.C.C. Rep. Serv. (Callaghan) 828, 833 (D. Kan. 1981); Voth v. Chrysler Motor Corp., 218 Kan. 644, 651-52, 545 P.2d 371, 378 (1976); Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 171, 253 N.W.2d 696, 697 (1977); Commissioners of Fire Dist. No. 9, Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566, 573, 424 A.2d 441, 445 (1980); Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 999, 354 N.Y.S.2d 778, 785, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974), *rev'd*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975) (six-year tort statute rather than Code's four-year sales-contract statute applicable); Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 871 (Wyo. 1980); *see also* Benco Plastics, Inc. v. Westinghouse Elec. Corp., 387 F. Supp. 772, 781 & n.13, 784 (E.D. Tenn. 1974).

Although some of these decisions concern suits for personal injuries allegedly sustained as a result of product defects (and therefore may be reasonable in finding that a repair obligation cannot be the basis of a personal injury claim), these courts' analysis of the § 2-725(2) future performance issue may influence other courts deciding cases involving solely economic loss. *But see Voth*, 218 Kan. at 647, 545 P.2d at 374-75 (defects warranty present); *Hansen*, 32 U.C.C. Rep. Serv. at 832 (same). For example, Owens v. Patent Scaffolding Co. has been cited relatively often in such cases. *See* R.W. Murray Co. v. Shatterproof Glass Corp., 529 F. Supp. 297, 299 (E.D. Mo. 1981), *rev'd*, 697 F.2d 818 (8th Cir. 1983); Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 671, 418 N.Y.S.2d 948, 950 (1979); Commissioners of Fire Dist. No. 9, Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566, 573, 424 A.2d 441, 445 (1980).

13. *See* Mountain Fuel Supply Co. v. Central Eng'g and Equip. Co., 611 P.2d 863, 871 & n.9 (Wyo. 1980). The court addressed the future performance issue after it found that the issue of whether the warranty period should have been tolled during repairs, *cf. infra* note 98, was "tie[d] into (and) intimately related to the concept that the warranty is one of future performance." *Id.* at 871.

14. *See* Hansen v. F.M.C. Corp., 32 U.C.C. Rep. Serv. (Callaghan) 828, 833 (D. Kan. 1981);

ranty explicitly extends to future performance of the *goods*."[15] A repair provision promises repair of the goods should they prove defective, not performance of the goods themselves.[16] Thus, under this analysis, the section 2-725(2) future performance exception is inapplicable to repair warranties.[17]

Because classifying a warranty as a promise of future performance of the goods brings it within section 2-725(2)'s exception to the delivery

---

Voth v. Chrysler Motor Corp., 218 Kan. 644, 651-52, 545 P.2d 371, 378 (1976); Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 171, 253 N.W.2d 696, 697 (1977); Commissioners of Fire Dist. No. 9, Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566, 573, 424 A.2d 441, 445 (1980); Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 999, 354 N.Y.S.2d 778, 785, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975) (six-year tort statute rather than Code's four-year sales-contract statute applies); Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 871 (Wyo. 1980); *see also* Grand Island School Dist. No. 2 v. Celotex Corp., 203 Neb. 559, 568, 279 N.W.2d 603, 609 (1979); Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 671, 418 N.Y.S.2d 948, 950 (1979); *cf.* Brauer v. Republic Steel Corp., 460 F.2d 801, 803 (10th Cir. 1972) (pre-U.C.C. law substantially in accordance with § 2-725(2); "durability" warranted); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1101 (N.D.N.Y. 1977) (pre-Code law in accord with U.C.C. § 2-725(2); both "present" and "prospective" warranties relate to "state" or "condition" of goods); Matlack, Inc. v. Butler Mfg. Co., 253 F. Supp. 972, 975 (E.D. Pa. 1966) ("performance of the engines"); Wilson v. Massey-Ferguson, Inc., 21 Ill. App. 3d 867, 872, 315 N.E.2d 580, 584 (1974) (§ 2-725(2) exception required explicit warranty as to "performance of the tractor" in question); Moorman Mfg. Co. v. National Tank Co., 92 Ill. App. 3d 136, 153-54, 414 N.E.2d 1302, 1315-16 (1980) (following *Wilson*; performance of "product"), *rev'd on other grounds*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982); Herbstman v. Eastman Kodak Co., 68 N.J. 1, 12, 342 A.2d 181, 186-87 (1975) (non-U.C.C. law; warranty as to future "condition" must be explicit; repair warranty distinguished).

15. U.C.C. § 2-725 (quoted *supra* note 3) (emphasis added). The exception also requires that "discovery of the breach must await the time of such performance." *Id.* This language similarly suggests that the Code drafters contemplated warranties that promised product performance beginning at the date of delivery, the breach of which promise was merely not apparent at delivery. *See also infra* note 112 and accompanying text.

16. Often a court will construe a warranty containing both a repair provision and a no-defects provision, one or both of which contain a time term, *see supra* note 11; *see also infra* notes 23 & 61, as not promising performance of the goods and therefore as nonprospective under U.C.C. § 2-725(2). *See generally supra* note 14.

17. Nonetheless, it is arguable that repair warranties *do* relate to performance of the goods and therefore can qualify as an explicit extension under subsection two of U.C.C. § 2-725. Although such warranties do not state that the goods will perform without defect, they do, in effect, ensure the performance of the goods by obligating the manufacturer to repair the goods when any defect manifests itself. *See* Chatlos Sys., Inc. v. National Cash Register Corp., 635 F.2d 1081, 1085 (3d Cir. 1980) (purpose of repair remedy is to give buyer goods that conform to the contract); *accord* Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973); *see also* Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 984, 433 N.Y.S.2d 888, 889 (1980) (where contract provided that "sole remedy" in event of defect was "correction of defect" by seller, contract explicitly extended to future performance under U.C.C. § 2-725(2) in that contract extended "to the future successful programming" that the parties agreed the defendant would have); Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 356 (Minn. 1977) ("repair and replacement clause provides . . . a remedy to the buyer, whereby he may secure goods conforming to the contract . . ."). Because the Code is to be "liberally construed and applied to promote its underlying policies and purposes," U.C.C. § 1-102(1), a court might validly effect the policy of § 2-725, *see infra* text accompanying note 94, by construing a repair provision as a "future performance" warranty.

rule, other classifications tend to accompany a finding that the exception is inapplicable and that the warranty in question is subject to the on-delivery rule. Courts concluding that repair warranties do not satisfy the "goods" requirement of the section 2-725(2) exception typically find that repair provisions are remedy limitations.[18] This is not to say that finding a repair provision to be a remedy limitation is, in itself, unreasonable[19] under the Code. In fact, two Code provisions provide

18. This seems to be the approach taken by the majority of courts considering the issue. A clear majority of courts subscribe to the view that repair warranties do not promise performance of the goods under U.C.C. § 2-725(2). *See supra* note 14 and accompanying text. While, of this group, only Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 171, 253 N.W.2d 696, 697 (1977), and Commissioners of Fire Dist. No. 9, Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566, 573, 424 A.2d 441, 445 (1980), have explicitly identified repair provisions as remedy limitations, *see infra* text accompanying notes 24 & 28, most of the other decisions that find the warranty to be breached at delivery describe the manufacturer's obligation as something triggered only when the goods fail. *See, e.g.*, Hansen v. F.M.C. Corp., 32 U.C.C. Rep. Serv. (Callaghan) 828, 833 (D. Kan. 1981); Voth v. Chrysler Motor Corp., 218 Kan. 644, 651-52, 545 P.2d 371, 375, 378 (1976); Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 999, 354 N.Y.S.2d 778, 785, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975); Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 871 (Wyo. 1980); *see also* Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 821 n.17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979), (finding that *Voth* had adopted a remedy approach). That is, most courts denying repair warranties prospective treatment have implicitly identified the repair provision as a "mere" remedy limitation. *See also infra* note 51. By contrast, few courts identifying repair provisions as remedy limitations have held that the statute begins running at any time after delivery. *See infra* notes 39-57 and accompanying text.

19. Identifying the repair provision as a limitation of remedies for breach of warranty makes the most sense where there is an underlying promise that the goods are not defective. Such a promise is the warranty while the repair provision is arguably the remedy. If the warranty contains no promise regarding defects, *see, e.g.*, Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 871 (Wyo. 1980); Commissioners of Fire Dist. No. 9, Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566, 572-73, 424 A.2d 441, 445 (1980); *see also supra* note 4, then this approach seems less sensible. In this situation, if the repair provision is a remedy limitation, there may be no warranty. This finding has an important implication: the basis under § 2-316(4) and § 2-719(1)(a) for finding that a repair provision is a limitation of "remedies for breach of warranty" may be eliminated. (§ 2-719(1)(a) seems to contemplate only warranties that promise that the goods are not defective in that it identifies the repair remedy as a means of redressing the problem of "non-conforming goods or parts.") Moreover, where a court finds that even a warranty containing both a promise regarding defects or product performance and a repair provision does not relate to the goods, *see, e.g.*, Hansen v. F.M.C. Corp., 32 U.C.C. Rep. Serv. (Callaghan) 828, 833 (D. Kan. 1981); *see also supra* note 14 and accompanying text, a finding that a repair provision is a limitation of remedy for breach of warranty may similarly be questioned. In both instances, as official comment two to § 2-316 states, "[i]f no warranty exists, there is of course no problem of limiting remedies for breach of warranty." U.C.C. § 2-316, Off. Comm. 2; *cf.* J. WHITE & R. SUMMERS, *supra* note 5, at 484 (there can be no warranty if the seller has disclaimed warranties).

Nevertheless, the Code, by suggesting limitation of remedies via repair provisions in § 2-719(1)(a), encourages the courts to construe the repair warranty in this fashion. *See infra* note 20; *cf.* 15 U.S.C. § 2301(10) (1982). Moreover, even if a repair provision could not qualify as a limitation of express warranty, it might arguably qualify as a remedy limitation for any *implied* warranties (such as warranties implied in law under the Magnuson Moss Warranty Act (*see* 15 U.S.C. § 2308(a) (1982)). A limitation of remedy, however, may well be found to apply only to an accompanying express warranty. *See* Water Works & Indus. Supply Co. v. Wilburn, 437 S.W.2d 951

a substantial basis for identifying repair provisions as remedy limitations.[20] Nevertheless, such a finding has meant, in all but a few cases,[21] that the on-delivery rule must be applied.[22]

(Ky. App. 1968); Holloway v. General Motors Corp., 60 Mich. App. 208, 230 N.W.2d 380 (1975), *aff'd on other grounds*, 399 Mich. 617, 250 N.W.2d 736 (1977), *rev'd on other grounds*, 403 Mich. 614, 271 N.W.2d 777 (1978); National Cash Register Co. v. Adell Indus., 57 Mich. App. 413, 225 N.W.2d 785 (1975), J. WHITE & R. SUMMERS, *supra* note 5, at 464 n.153; Annot., 2 A.L.R.4TH 576, 589 (1980 & Supp. 1983); *see also* Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co., 35 Cal. App. 3d 948, 957-60, 111 Cal. Rptr. 210, 216-17 (1973); Jarnot v. Ford Motor Co., 191 Pa. Super. 422, 428, 156 A.2d 568, 571 (1959); *cf.* Ventura v. Ford Motor Corp., 180 N.J. Super. 45, 61-62, 433 A.2d 801, 809-810 (App. Div. 1981). Where such a remedy limitation *is* held to apply to implied warranties, such application should and will be stated expressly in the warranty. *See, e.g.*, Southwest Forest Indus. v. Westinghouse Elec. Corp., 422 F.2d 1013, 1015 n.2, 1019 (9th Cir. 1970); Orrox Corp. v. Rexnord, Inc., 389 F. Supp. 441, 442 (M.D. Ala. 1975); Schultz v. Jackson, 67 Ill. App. 3d 889, 891, 893, 385 N.E.2d 162, 163, 165 (1979); *see also* U.C.C. § 2-719(1)(b); Council Bros. v. Ray Burner Co., 473 F.2d 400, 406 & n.6 (5th Cir. 1973); Wyatt Indus. v. Publiker Indus., 420 F.2d 454, 456 (5th Cir. 1969); Hahn v. Ford Motor Co., 434 N.E.2d 943, 947 (Ind. App. 1982). Thus, where there is no such express statement, it seems inaccurate to identify the repair provision as a remedy limitation.

20. U.C.C. § 2-316(4) provides that "[r]emedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation of damages and on contractual modification of remedy." Section 2-719, the Article Two provision on contractual modification of remedy, explicitly authorizes the parties to limit the "buyer's remedies to return of the goods and repayment of the price or to *repair or replacement* of nonconforming goods or parts . . ." U.C.C. § 2- 719(1)(a) (emphasis added). Not surprisingly, given this Code language, many courts (not considering the applicability of the statute of limitations) have in fact treated such repair/replacement provisions as attempts to create exclusive remedies. *See* Posttape Assocs. v. Eastman Kodak Co., 537 F.2d 751, 756 (3d Cir. 1976); Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973); Aetna Casualty & Surety Co. v. Eastman Kodak Co., 10 U.C.C. Rep. Serv. (Callaghan) 53, 57 (D.C. Super. Ct. 1972); Orange Motors, Inc. v. Dade County Dairies, Inc., 258 So.2d 319, 320, 10 U.C.C. Rep. Serv. (Callaghan) 325, 326-27 (Fla. Dist. Ct. App. 1972); Ford Motor Co. v. Mayes, 575 S.W.2d 480, 483 (Ky. App. 1978); *see also* Patron Aviation, Inc. v. Teledyne Indus., Inc., 154 Ga. App. 13, 16, 267 S.E.2d 274, 278 (1980); Kusens v. Bodyguard Rustproofing Co., 23 Ohio Op. 3d 440, 440, 33 U.C.C. Rep. Serv. (Callaghan) 530, 531 (Ct. App. 1980); Special Project, *Article Two Warranties in Commercial Transactions*, 64 CORNELL L. REV. 30, 226 n.829 (1978). *See generally* U.C.C. Case Dig. ¶ 2719.4 (1981 & Supp. 1982); U.C.C. Case Dig. ¶ 2316.12(6) (1982 & Supp. 1982); U.C.C. § 2-719, 1A U.L.A. 500 n.7 (1976 & Supp. 1983).

21. *See infra* notes 39-54 and accompanying text.

22. The identification of the repair provision as a remedy limitation may itself suggest an answer to the question of the action accrual date. Although the Code's definition of "remedy" is circular regarding its description of what it is that becomes available to one who possesses a remedial right, it does make it clear that "aggrieved" parties possess such rights: " 'Remedy' means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal." U.C.C. § 1-201(34). *See also* U.C.C. § 1-201(2) (aggrieved party is one entitled to resort to a remedy); U.C.C. § 1-201(36) (" 'rights' includes remedies"). The present availability of a *remedy* thus seems to indicate that the seller has already breached its *obligation* under the warranty: "[O]bligations and remedies are counterparts; when the seller fails to do what he is required to do by the contract, i.e., fails to perform his obligation, the buyer may invoke an appropriate remedy." J. WHITE & R. SUMMERS, *supra* note 5, at 482 n.236; *see* Ford Motor Co. v. Reid, 250 Ark. 176, 184, 465 S.W.2d 80, 85 (1971); Lincoln Pulp & Paper Co. v. Dravo Corp., 436 F. Supp. 262, 277 n.18 (D. Maine 1977); Casady v. Casady, 31 Utah 394, 399-400, 88 P. 32, 34 (1906) (citing POMEROY, CODE REMEDIES 463-64 (4th ed. 1904) (remedial right springs into being as consequence of plaintiff's primary right)); *see also* Hahn v. Ford Motor Co., 434 N.E.2d 943, 952-53 (Ind. App. 1982) (limitation of remedy "restricts remedy available once

Thus, in *Centennial Insurance Co. v. General Electric Co.*,[23] the Michigan Court of Appeals analyzed a repair provision as "a specification of remedy to which the buyer is entitled should breach be discovered within the first year."[24] As such, the repair provision could not warrant "performance" of the goods, and was not entitled, as plaintiff had argued, to prospective treatment (application of a later-than-delivery action accrual date) under section 2-725(2).[25] Thus, the warranty had been breached and the limitations period had begun on the date of delivery.[26] The court indicated that any ambiguity concerning the proper construction of the repair provision should be resolved in favor of a nonprospective construction because section 2-725(2) required that a future performance warranty be explicitly stated.[27]

Another court found that a " 'conditional' warranty for a period of one year from date of delivery involving only a remedy — i.e. repair or replacement related to defective material or workmanship" did not constitute a warranty explicitly extending to future performance of the goods.[28] As in *Centennial*, the court found that the remedy provision containing the promise to repair or replace did not warrant product[29] performance and thus could not receive prospective treatment.[30]

This approach, however, is unsound. If a court finds that a repair provision is not within the terms of section 2-725(2)'s future performance exception because it does not promise performance of the goods,

---

a breach has been established"); Gladden v. Cadillac Motor Car Div., 83 N.J. 320, 330, 416 A.2d 394, 399 (1980) (same); J. WHITE & R. SUMMERS, *supra* note 5, at 472 (same). *But see* Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 821 n.17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979). Where a repair provision is identified as a remedy, the implication is therefore that this provision exists to redress the breach of another obligation — most likely an underlying warranty against defects. But only where the underlying warranty (if one exists) can, by its terms, be breached at a time after delivery may the remedial right itself accrue at a time after delivery. *See infra* note 51. *But see infra* note 90.

23. 74 Mich. App. 169, 253 N.W.2d 696 (1977). In *Centennial* the court considered a warranty that promised that the product was not defective and that if defects appeared within one year they would be corrected. *Id.* at 171 n.1, 253 N.W.2d at 697 n.1. The court denied the entire warranty prospective treatment. *Id.* at 171-72, 253 N.W.2d at 697. The presence of a warranty of performance of the goods, however, arguably brings the *Centennial* warranty within the terms of § 2-725(2)'s future performance exception. One might object that the time term (one year) is contained in the repair provision, not the defects provision. *See id.* Because the court concluded, however, that the repair provision was only a remedy limitation, *id.*, it seems reasonable to conclude that the time term was a statement of the no-defects warranty's effective period.

24. *Id.* at 171, 253 N.W.2d at 697.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See* Commissioners of Fire District No. 9 Iselin, Woodbridge, N.J. v. American La France, 176 N.J. Super. 566, 572-73, 424 A.2d 441, 445 (1980). The court did not provide an exact quotation of the repair warranty. *Id.* A separate warranty against defects was held to satisfy the § 2-725(2) exception's requirements. *Id.*

29. *See supra* text accompanying note 14.

30. 176 N.J. Super. at 573, 424 A.2d at 445.

its analysis is incomplete. This approach assumes that section 2-725(2)'s general rule of action accrual at "tender of delivery"[31] is applicable because a repair provision does not warrant performance of the goods. The on-delivery rule itself, however, applies only in situations involving breach of a "warranty,"[32] which, under the Code, must also relate to the goods.[33] If a court views a repair provision as a remedy limitation not extending to product performance rather than as a warranty, the on-delivery rule should not apply to that[34] provision.[35] The parties may still look to section 2-725(2)'s first sentence, which provides that the cause of action accrues "when the breach occurs."[36] This provision is not limited to promises that relate to the goods.[37] It is clear,

---

31. *See* U.C.C. § 2-725(2).

32. *Id.*

33. *See* U.C.C. § 2-313(1), (2).

34. The general on-delivery rule would arguably apply, however, to any no-defects obligation (either implied or express) not applicable in the future, because such provisions are "warranties" under the Code. *See* U.C.C. §§ 2-313, 2-725. *But see infra* note 41 (breach of repair obligation can be separated from that of no-defects obligation).

35. U.C.C. § 2-313's requirement that an express warranty "relate" to the goods, *see* U.C.C. § 2-313(1), (2), is arguably broader than the § 2-725(2) requirement that a warranty explicitly extend to future performance of the goods. Thus, aside from the issue of the intended future operation of a warranty, a provision could qualify as an express warranty and yet not be excepted from § 2-725(2)'s general rule of action accrual at delivery.

A promise to repair, however, does not satisfy the § 2-313 "relate to the goods" requirement, which is merely a codification of the generally accepted view of warranties as promises relating to the quality of the goods. *See* Seely v. White Motor Co., 63 Cal. 2d 9, 16, 403 P.2d 145, 150, 45 Cal. Rptr. 17, 33, 2 U.C.C. Rep. Serv. (Callaghan) 915, 919-20 (1965) (Traynor, C.J.); D. EPSTEIN & J. MARTIN, BASIC UNIFORM COMMERCIAL CODE 320 (2d ed. 1983); Note, *Uniform Commercial Code—A Limited Remedy Fails of Its Essential Purpose Only In The Case Of a Negligent or Willful Repudiation of the Remedy*, 51 TEX. L. REV. 383, 386 (1973); *cf.* Hahn v. Ford Motor Co., 434 N.E.2d 943, 952-53 (Ind. App. 1982) (disclaimer or modification of warranty eliminates quality commitment). A repair provision relates not to the goods and their quality, but to the manufacturer and its obligation to the purchaser. *See* Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 999, 354 N.Y.S.2d 778, 784, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975). To construe § 2-313 broadly enough to include repair provisions might make it meaningless: "[i]f a promise to repair relates to the goods, then so would nearly every provision in the contract of sale." Special Project, *supra* note 20, at 226. The Magnuson-Moss Warranty Act concedes the distinction between a promise that "relates to the nature of the material or workmanship" and "any undertaking . . . in connection with the sale . . . to refund, repair, replace, or take remedial action with respect to such product" by separating these descriptions into subsections in its definition of written warranty. *See* 15 U.S.C. § 2301(6)(A), (B) (1975); *cf.* CAL. CIVIL CODE § 1791.2(a)(1) (Deering 1981). In stark contrast, the Code's definition of warranty contains only "relates to the goods" language and therefore does not reach repair provisions. *See* Eddy, *Effects of the Magnuson-Moss Act upon Consumer Product Warranties*, 55 N.C.L. REV. 835, 853-54 (1977); *see also* J. WHITE & R. SUMMERS, *supra* note 5, at 370; Matlack, Inc. v. Butler Mfg. Co., 253 F. Supp. 972, 976 (E.D. Pa. 1976). *But see supra* note 17. Moreover, a court's finding that a repair provision is a remedy limitation constitutes an implicit recognition of the fact that such a provision is not a warranty under the Code. *See* Ford Motor Co. v. Reid, 250 Ark. 176, 184, 465 S.W.2d 80, 85 (1971). Thus, a repair "warranty" falls beyond the scope of *both* the future performance exception and the on-delivery rule.

36. *See* U.C.C. § 2-725(2).

37. *Id. But see infra* note 112.

however, that neither of the Code's rules for determining when the breach occurs — the on-delivery rule and the future performance exception — applies to repair warranties. Thus, neither of these provisions can determine the date of breach for such warranties.

2. Future Performance Exception as Applicable to Repair Warranties Despite Characterization as a Remedy Limitation— Many courts[38] have adopted the *Centennial* approach and have found that because a repair provision is merely a remedy limitation it cannot promise future product performance. Three courts, however, have found that characterizing a repair provision as a remedy limitation does not foreclose prospective treatment of a repair warranty under section 2-725(2).

In *Standard Alliance Industries, Inc. v. Black Clawson Co.*,[39] the court considered a warranty that contained both a promise that the product was not defective and a promise that it would be repaired if shown to be defective within one year. The court found that the no-defects provision explicitly extended to future performance and thus that the action had accrued on this provision when plaintiff had discovered or should have discovered the defect.[40] The court analyzed the repair provision separately[41] and found that even though this pro-

38. *See supra* note 18.

39. 587 F.2d 813, 816-17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

40. *Id.* at 821.

41. In Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 253 N.W.2d 696 (1977), the court rejected plaintiff's alternative argument that the repair provision was a separate contract that could be breached separately from the contract of sale. *Id.* at 172, 253 N.W.2d at 697. Nevertheless, the *Centennial* holding may not apply in cases in which a *sole* warranty to repair was issued. A reading of the *Centennial* warranty reveals that a warranty against defects — as well as a promise to repair — was offered. Only the promise to repair, however, extended for a one year period; the warranty against defects did not. Thus, the warranty against defects arguably *was* breached upon delivery, given the "future" requirement of U.C.C. § 2-725(2). Because the court found that the repair provision was inseparable from the warranty against defects, *id.*, this provision could not be given independent construction. Where there is no attached nonprospective no-defects provision, however, a repair provision might be held breached upon failure to repair.

Moreover, for two reasons, *Centennial* should not be the rule for repair warranties in general, including ones that (also) promise that the product is not defective. First, a court may find that a repair provision may be separated from a defects provision for statute of limitations purposes. *See Standard Alliance* at 821-22 nn. 17 & 22; *see also* Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co., 35 Cal. App. 3d 948, 959, 111 Cal. Rptr. 210, 216-18 (1973); Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 418 N.Y.S.2d 948 (1979); Krueger v. V.P. Christianson Silo Co., 206 Wis. 460, 240 N.W. 145 (1932); *cf.* Hollin v. Libby, McNeill and Libby, 253 Or. 8, 14, 452 P.2d 555, 558 (1969) (plaintiff has choice of awaiting second, separate breach; limitations period for second breach begins at later point than that for first). The Code implies separate breach/action acrual dates for a purchaser's different warranty actions by denying implied warranties prospective treatment because they are not "explicit," while giving future performance warranties a later-than-delivery breach/action accrual date. *See supra* notes 3 & 5; *see also* Dennin v. General Motors Corp., 78 Misc. 2d 451, 452, 357 N.Y.S. 668, 671 (1974) (even if action on express warranty barred by contractual limitation of limitations period, implied warranty claim survives limitation). As noted above, if the provisions are separated, the

vision was a remedy limitation,[42] the action accrued upon defendant's failure to repair,[43] not the date of delivery or even the date of discovery of the defect.[44] Indeed, the court specifically stated that a repair provision could itself explicitly extend to future performance.[45]

Similarly, in *Rochester Welding Supply Corp. v. Burroughs Corp.*,[46] the court held that a contract[47] limiting the seller's remedy "in the event of defect" to "correction of such defect" by the seller explicitly extended to future performance and was breached when defendant admitted "that it could not correct the defects."[48] According to the court, the limitations period began only after this admission.[49]

In a recent case, *R.W. Murray Co. v. Shatterproof Glass Corp.*,[50] the court found that the presence of a "limitation of remedy to replacement" did not prevent a warranty against defects from extending to future performance under section 2-725(2).[51] The court considered two

---

repair provision may be given independent prospective treatment.

Second, the court's concern that the limitations period could be extended infinitely because it could be argued that each failure to remedy a breach gave rise to a new cause of action, 74 Mich. App. at 172, 253 N.W.2d at 697, is senseless. While the purchaser may, as in *Centennial*, argue that the repair promise is a separate obligation breached when the seller fails to repair, there is no later, third obligation triggered by the seller's failure to fulfill the repair obligation. If the warranty to repair extends for a one year period, the breach can occur, at the latest, one year after delivery of the product. Because under § 2-725(2) the statute of limitations runs for four years, the last point at which an action for breach can be brought under a date of failure to repair rule is the day precisely five years after delivery. *But see infra* note 98 (potential tolling).

42. 587 F.2d at 818 n.10, 821 n.17. The court stated:

> We see no conceptual distinction between saying that a product is warranted for one year against defects, the remedy limited to repair or replacement and saying that, should a breach be discovered within one year, the seller will repair or replace defective parts. Both are warranties explicitly extending to future performance. We recognize that there may be differences between remedies and warranties, *see* fn. 10, but we do not believe that these distinctions make a difference here.

Id. at 821 n.17.

43. Defendant had unsuccessfully attempted to repair the goods. *Id.* at 818, 822 n.22.

44. *Id.* at 822. *See also id.* n.22.

45. *Id.* at 821 n.17.

46. 78 A.D.2d 983, 433 N.Y.S.2d 888 (1980).

47. A contract provision such as that considered in *Rochester Welding Supply, id.* at 983, 433 N.Y.S.2d at 889, qualifies as a warranty. *See* U.C.C. § 2-313.

48. 78 A.D.2d at 984, 433 N.Y.S.2d at 889.

49. *Id.* at 983-84, 433 N.Y.S.2d at 889. The court also found that a separate contract that provided that the sale was "subject to the final approval" to the buyer's "satisfaction" explicitly extended to future performance under U.C.C. § 2-725(2). *Id.* at 983-84, 433 N.Y.S.2d at 888-89.

50. 697 F.2d 818 (8th Cir. 1983).

51. *Id.* at 823. The court's explanation was that it did not "believe that the presence of language limiting the remedy to replacement of defective materials, by itself, is determinative of the exact nature of the warranties in question." *Id.* While this decision was sensible so far as it went, it may have serious implications for other kinds of repair warranties. Where, for example, a repair warranty is a sole warranty to repair (perhaps half of all written warranties, *see supra* text accompanying note 2), *see, e.g.*, Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 984, 433 N.Y.S.2d 888, 889 (1980), the *R.W. Murray* remedy construction may mean that the future performance exception cannot apply. If the repair promise is

warranties, one that promised that the product would be free from defects for twenty years and that if it were defective, it would be repaired, and one that strangely seemed to promise that the product would repair itself.[52] The lower court had held that the action was barred by the statute of limitations because, being only "replacement commitments," the warranties could not extend to performance of the goods.[53] The court of appeals reversed, holding that the defendant had alleged the existence of warranties that explicitly extended to future performance of the goods.[54] Unlike the *Standard Alliance*[55] and *Rochester Welding*[56] courts, the court found that the action had accrued when the defect had been or should have been discovered.[57] Apparently it did not occur to the *R.W. Murray* court, as it had to the the courts in *Standard Alliance* and *Rochester Welding*, that because the seller had promised to repair, the action should have accrued not upon discovery of the defect, but upon discovery that the seller had failed to repair.[58]

The *R.W. Murray* court's interpretation is understandable, however, in light of its construction of the repair provision as a remedy limitation that did not play a role in the determination of the action accrual date.[59] Because the court found that the no-defects provisions themselves extended to future performance,[60] the warranties could be given pro-

---

a remedy and there is no other promise, there may be no warranty available that can "explicitly extend," even where the repair promise is for a specified future period. Moreover, it is possible that where, as in Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 171 n.1, 253 N.W.2d 696, 697 n.1 (1977), and Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 816-17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979), the time term of a warranty against defects with repair as remedy is contained only in the repair provision, the warranty might not explicitly extend. The theory in such a case might be that (as the court held in *Centennial*) the remedy provision *cannot* explicitly extend. The warranty against defects, which might otherwise qualify under the § 2-725(2) exception, would contain no time provision itself, and therefore could not warrant future performance. Thus, the division of the repair warranty into warranty and remedy, approved by the *R.W. Murray* and *Centennial* courts, may act to sever from a repair warranty the prospectiveness it might have if it were read as a whole. *But see R.W. Murray*, 697 F.2d at 823 (court cited *Standard Alliance*, 587 F.2d at 821 & n.17, with approval).

52. *R.W. Murray*, 697 F.2d at 821-22 & nn.2-3.

53. R.W. Murray Co. v. Shatterproof Glass Corp., 529 F. Supp. 297, 299 (E.D. Mo. 1981), *rev'd*, 697 F.2d 818 (8th Cir. 1983).

54. 697 F.2d at 818. This conclusion is questionable as to the first warranty the court considered. *See id.* at 821-22 & n.2. It is arguable that this provision is no more than a manufacturer's promise to repair. If this is the case, the court, by holding that this provision explicitly extended to future performance, gave a sole repair promise — a remedy limitation in the view of the court, *see id.* at 823 — prospective treatment.

55. *See supra* text accompanying note 43.

56. *See supra* text accompanying note 49.

57. 697 F.2d at 824.

58. The court seems to have read the language in Code § 2-725(2), "when the breach is or should have been discovered," to mean "when the nonconformance of the goods is or should have been discovered."

59. *See R.W. Murray*, 697 F.2d at 823.

60. *Id. But see supra* note 54.

spective treatment without consideration of the repair provisions.[61] Nonetheless, regardless of whether a repair warranty contains a no-defects provision extending to future performance, a finding that breach of the repair provision[62] occurs only upon failure to repair is sensible because it looks to the terms of that provision to determine when the purchaser may initiate an action against the manufacturer.[63]

B. The Need to Look Outside the Code

Characterizing a repair provision as a remedy limitation should not alter the law relating to when the purchaser may enforce a right to repair.[64] This is apparently what motivated the Sixth Circuit in *Standard Alliance*[65] to decide that regardless of characterization — remedy or warranty — a repair provision explicitly extended to future performance under section 2-725(2).[66]

The *Standard Alliance* approach, however, is not without problems. Although this approach produces a sound result, it ignores the "goods" language of the Code's exception for future performance warranties.[67]

---

61. Importantly, in *R.W. Murray*, at least one of the warranties contained a promise that the product would perform for a specific period of time. 697 F.2d at 822 n.3. Thus, this promise could explicitly extend to future performance. *See supra* note 11. In Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 816-17 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979), however, only the repair provision contained a time term. Ironically, the *Standard Alliance* court also construed the repair provision as a remedy limitation, finding "no conceptual distinction between saying that a product is warranted for one year against defects, the remedy being limited to repair or replacement and saying that should a breach be discovered within one year, the seller will repair or replace defective parts. Both are warranties explicitly extending to future performance." 587 F.2d at 821 n.17. If there is in fact no difference between the two statements, the fact that the time term was contained in the repair provision should arguably not play a role in the action accrual date determination since the time term may apply, under this analysis, to the warranty as a whole, including the promise regarding defects. If, however, a remedy may not extend to future performance under U.C.C. § 2-725(2), the location of the time term is critical because a provision without a time term probably cannot be given prospective treatment. *See supra* note 11. If a repair provision can, as the *Standard Alliance* court acknowledged, extend to future performance under U.C.C. § 2-725(2), it must be asked how such a provision could be breached, as the *R.W. Murray* court found, upon discovery of the defect rather than upon breach of that provision — failure to repair — as required in this section of the Code. (It is not clear whether the contract considered in *Rochester Welding*, 78 A.D.2d at 983, 433 N.Y.S.2d at 889, contained a time term.)

62. As to the validity of separating different warranty obligations for action accrual date purposes, see *supra* note 41.

63. *See* Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 671, 418 N.Y.S.2d 948, 950 (1979); Dennin v. General Motors Corp., 78 Misc. 2d 451, 452, 357 N.Y.S.2d 668, 670 (1974). *See also infra* notes 84-86 and accompanying text.

64. *See infra* notes 90-91 and accompanying text.

65. Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979).

66. *Id.* at 821 n.17.

67. In footnote 17 of the court's opinion (quoted *supra* note 42) no mention is made of

On the other hand, courts applying the on-delivery rule to repair provisions have recognized the importance of the "goods" requirement but have ignored both the additional language in section 2-725(2) limiting the on-delivery rule to warranties[68] and the obvious forward-looking nature of repair provisions. Thus, cases applying the Code language err both when they apply the on-delivery rule to repair provisions and when they apply the future performance exception to such provisions. As a result, a court considering a repair warranty is left without applicable Code language relating to the appropriate action accrual date.

A court facing this situation, however, may decide to apply *neither* the on-delivery rule nor the future performance exception, but look to law outside the Code for the proper rule.[69] This is permitted, and probably required, by section 1-103, which provides that principles of law and equity not displaced by Code rules supplement the Code's provisions.[70] Thus, in making the determination required by section 2-725(2) as to the date of breach,[71] a court may consider and apply non-Code law.

C. *The Answer Outside the Code*

A substantial body of law holding that repair warranties are breached only upon the seller's failure to repair does not find its root in the Uniform Commercial Code. Although non-Code law cannot conclusively

---

the "goods" term in U.C.C. § 2-725(2). *See Standard Alliance*, 587 F.2d at 821 n.17; *cf.* Glen Peck Ltd. v. Fritsche, 651 P.2d 414, 415 (Colo. App. 1981).

68. *See supra* notes 32-35 and accompanying text.

69. Two cases, Space Leasing Assocs. v. Atlantic Bldg. Sys., Inc., 144 Ga. App. 320, 325, 241 S.E.2d 438, 441 (1977), and Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 418 N.Y.S.2d 948 (1979), can be said to be both sources of non-Code case law and instances in which a court, interpreting § 2-725, drew on non-Code law. *See infra* notes 80-86 and accompanying text.

70. U.C.C. § 1-103 is entitled "Supplementary General Principles of Law Applicable" and provides in full: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." Professor Summers has made a persuasive case for interpreting U.C.C. § 1-103 to allow courts to modify and create exceptions to Code provisions where equitable principles are involved. *See* Summers, *General Equitable Principles under Section 1-103 of the Uniform Commercial Code*, 72 Nw. U.L. REV. 906, 935 (1978); *see also* J. WHITE & R. SUMMERS, *supra* note 5, at 20 (§ 1-103 imposes a "duty" to apply general equitable principles unless displaced); Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 467, 188 S.E.2d 250, 253, 10 U.C.C. Rep. Serv. (Callaghan) 771, 775 (1972); E. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES 13-14 (1975) ("[e]quity will not suffer a wrong to be without a remedy"; "[e]quity regards substance rather than form").

71. U.C.C. § 2-725(2) requires, in all breach of contract actions, that the cause of action accrue when the breach occurs. As is the case with the § 2-725(1) four year rule, *see supra* note 5, this requirement is general and would seem to apply in any contract action involving the sale of goods. Thus, any non-Code rule establishing an action accrual date different than the date of breach or establishing a different limitations period *would* be displaced by the Code.

establish that repair warranties are breached upon failure to repair, this body of law can provide a sound basis for such a conclusion.

1. Warranties Ineligible for Code Treatment— Several courts considering warranties that were or are ineligible for Code treatment have concluded that an action accrues on a repair obligation only upon the seller's failure to repair. In one case, the court considered a contract[72] for which an action had accrued before the Code's effective date in Missouri.[73] The court found that the contract, which provided that the goods would meet certain specifications and that the defendant would remedy defects that appeared within one year of a specified date, had been breached, if at any time, on the day one year after that date.[74] Thus, the limitations period had begun at the end of the interval during which defendant had agreed to remedy any defects.[75] In an earlier case, the parties had executed two agreements, one in which defendant had promised to build a silo in a "substantial and workmanlike manner," and one in which defendant had promised "to repair or replace defects free of charge for a period of ten years."[76] Although the court found that the first promise had been breached upon completion of construction when defendant had failed to build the silo in a workmanlike manner, it found that the repair promise had "continued" for ten years after completion, so that the action on this promise was not barred by the statute after this ten year period.[77] Finally, in a recent non-Code case, a home builder had contracted to remedy defects called to its attention within one year of the closing date.[78] The court found that the cause of action had not accrued until the defendant had re-

---

72. *See supra* note 47.

73. *See* Baldwin Plaza Corp. v. H.B. Deal Constr. Co., 462 S.W.2d 687, 689 (Mo. 1971).

74. *Id.* at 688-89; *cf.* Neal v. Laclede Gas Co., 517 S.W.2d 716, 718 (Mo. Ct. App. 1974) (citing *Ballwin Plaza*) (action for breach of one-year "guarantee" did not accrue until end of guarantee period during which defendant must have had opportunity to make repairs).

75. 462 S.W.2d at 689-90. *But see id.* at 689 (statute provided that cause of action accrued when damage "capable of ascertainment").

76. *See* Krueger v. V.P. Christianson Silo Co., 206 Wis. 460, 460-61, 240 N.W. 145, 145 (1932).

77. 206 Wis. at 462-63, 240 N.W. at 146; *see also* Fowler v. A & A Co., 262 A.2d 344, 347-48 (D.C. 1970) (home improvement "guarantee," construed as "promise to do whatever is necessary, including repair of improperly performed work, to provide the guaranteed dry basement," breached only upon total repudiation of the contract). In Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co., 35 Cal. App. 3d 948, 111 Cal. Rptr. 210 (1973), apparently a pre-Code case, the court found that a "warranty to repair" was breached when the manufacturer indicated that the goods were not in need of repair. *Id.* at 957-59, 111 Cal. Rptr. at 215-17. Because the manufacturer had offered separate, prospective, express no-defects warranties, however, the court held that the limitations period had not begun until the purchaser had discovered the defect. *Id.* at 958-61, 111 Cal. Rptr. at 217-19.

78. *See* Spinoso v. Rio Rancho Estates, Inc., 96 N.M. 5, 7, 626 P.2d 1307, 1309 (1981). In *Spinoso*, the case was beyond the scope of the Code presumably because the contract related to construction of a home, which is not a "good" under U.C.C. § 2-105(1).

fused to cure the defect.[79] Thus, cases in which the Code was not available for application indicate that the statute of limitations for repair provisions begins to run only upon failure to repair.

2. The Repair Warranty as Exception to Code Action Accrual Date Provisions— Even in cases in which the Code might otherwise have been applicable some courts have found that repair provisions are excepted from ordinary Code action accrual date requirements. One court found that although a breach of warranty generally occurs upon delivery, in the case of repair warranties, "it is the refusal to remedy within a reasonable time, or a *lack of success* in the attempts to remedy which would constitute a breach of warranty."[80] Thus, the action could accrue only after the seller failed to repair. Although the court quoted (in a footnote) section 2-725(2) in full, it avoided any mention of the future performance exception.[81] Perhaps because it realized that repair provisions do not promise performance of the goods as required by Code language,[82] the court cited non-section 2-725 precedent as authority for giving the repair provision prospective treatment.[83]

In two other cases,[84] the courts implicitly established an exception

---

79. 96 N.M. at 9 & n.3, 626 P.2d at 1311 & n.3.

80. *See* Space Leasing Assoc. v. Atlantic Bldg. Systems, 144 Ga. App. 320, 325, 241 S.E.2d 438, 441 (1977) (emphasis in original) (citations omitted). The provision in question was a six-year warranty of "workmanship and material" under which the seller's "obligation [was] to furnish to the building site replacement material" in case of defect. 144 Ga. App. at 321, 241 S.E.2d at 439.

81. *Id.* at 324-25 n.3, 241 S.E.2d at 439 n.3.

82. *See supra* text accompanying notes 14-16.

83. The court cited Jacobs v. Metro Chrysler-Plymouth, 125 Ga. App. 462, 188 S.E.2d 250 (1972); General Motors Corp. v. Halco Instruments, Inc., 124 Ga. App. 630, 185 S.E.2d 619 (1971); and Ford Motor Corp. v. Gunn, 123 Ga. App. 550, 181 S.E.2d 694 (1971).

84. *See* Dennin v. General Motors Corporation, 78 Misc. 2d 451, 357 N.Y.S.2d 668 (N.Y. Sup. Ct. 1974); Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 418 N.Y.S.2d 948 (1979). In *Dennin*, defendant-manufacturer argued that a one-year warranty promising that the product was not defective and that the manufacturer would correct defects in "material and workmanship" constituted a contractual limitation of the limitations period. 78 Misc. 2d at 452, 357 N.Y.S.2d at 670. *See* U.C.C. § 2-725(1) (quoted *supra* note 3). While the court noted § 2-725, it ignored the future performance of the goods exception, finding that the warranty

> establishe[d] *by its plain language* a period during which a cause of action might accrue for failure to repair or replace a defect in material or workmanship. By this warranty if a covered defect is brought to the attention of the seller during this period and the seller fails to repair, or at its option replace the part, a cause of action in favor of the buyer arises upon which he may sue for a period of four years *thereafter*.

78 Misc. 2d at 452, 357 N.Y.S.2d at 670 (emphasis added).

In *Shapiro*, the court found that a ten-year guarantee against "tank failure" (arguably a warranty of product performance) did not promise performance of the product under U.C.C. § 2-725(2) and thus that the limitations period had expired at delivery. 71 A.D.2d at 671, 418 N.Y.S.2d at 950. The court noted, however, that the warranty contained a promise that the manufacturer would replace the product if it developed a leak within ten years after installation. *Id.* Based on this provision, the court found that plaintiff had a cause of action that was not barred: "Because the contract warranty is good for 10 years *by its own terms*, it is evident that

to the Code's requirements, finding that the language of the repair provision itself revealed the parties' intent to create a future obligation.[85] Thus, a non-Code explanation — the parties' own agreement — was offered for giving the repair provision prospective treatment.[86]

3. Breach of Repair Warranty Possible Only Where Seller Has Failed to Remedy Defects— Many courts, without addressing the statute of limitations question, have found that a repair warranty is not breached until the seller has had an opportunity to remedy defects and has failed to do so.[87] These findings are consistent with the often quoted rule that where the agreement provides the seller the right to remedy defects, a finding of breach does not require the buyer to permit the seller "to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty."[88] If the seller may

---

it survives the four year statute of limitations in some respects. The seller has promised to replace a defective unit for 10 years and that promise is undoubtedly enforceable by the buyer." *Id.* (emphasis added). Thus, the statute had not run on the 10-year promise to replace. (The decision indicates that ten years had not passed since delivery of the product. Nevertheless, because the guarantee was held to be enforceable more than four years after the delivery of the product, the accrual date for the purposes of the statute of limitations must have been thought to have been later than the date of delivery.)

85. In at least one case a court has adopted without § 2-725 analysis the plain language rule found in *Dennin* and *Shapiro*. *See* Lieb v. Milne, 95 N.M. 716, 625 P.2d 1233 (1980). In *Lieb*, where defendant was bound by a warranty to repair, the court ruled that "if Milne refused to provide the warranted service, the action was perfected *at that time*—subject only to the statutory time limit for filing an action." *Id.* at 720, 625 P.2d at 1237 (emphasis added) (citing Dennin v. General Motors Corp., 78 Misc. 2d 451, 357 N.Y.S. 668 (N.Y. Sup. Ct. 1974) ("plain language")). *Cf.* Ballwin Plaza Corp. v. H.B. Deal Constr. Co., 462 S.W.2d 687, 689 (Mo. 1971) ("language" of contract, specifications, and defendant's letter to plaintiff).

86. *Cf.* U.C.C. § 1-102(3) (effect of Code's provisions may be varied by the parties, except as otherwise provided in the Code).

87. *See* Rose v. Chrysler Motors Corp., 212 Cal. App. 2d 755, 763, 28 Cal. Rptr. 185, 190 (1963); Allen v. Brown, 181 Kan. 301, 308, 310 P.2d 923, 928 (1957); Draffin v. Chrysler Motors Corp., 252 S.C. 348, 352, 166 S.E.2d 305, 308 (1969); Cannon v. Pulliam Motor Co., 230 S.C. 131, 140, 94 S.E.2d 397, 400 (1956); *see also* Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co., 35 Cal. App. 3d 948, 958-59, 111 Cal. Rptr. 210, 217 (1973); Patron Aviation, Inc. v. Teledyne Indus., Inc., 154 Ga. App. 13, 16, 267 S.E.2d 274, 278 (1980) (quoting Space Leasing Assocs. v. Atl. Bldg. Sys., 144 Ga. App. 320, 325, 241 S.E.2d 438, 441 (1977)); Ford Motor Co. v. Gunn, 123 Ga. App. 550, 551, 181 S.E.2d 694, 696 (1971); Mueller v. Keeley, 165 Neb. 243, 259, 85 N.W.2d 309, 318 (1957); Kure v. Chevrolet Motor Div., 581 P.2d 603, 608 (Wyo. 1978); *cf.* Fargo Mach. & Tool Co. v. Kearney & Trecker Corp., 428 F. Supp. 364, 374 (E.D. Mich. 1977); Beal v. General Motors Corp., 354 F. Supp. 423, 426 (D. Del. 1973) (failure to repair is breach under warranty to repair); Courtesy Ford Sales, Inc. v. Farrior, 53 Ala. App. 94, 102, 298 So.2d 26, 33, 15 U.C.C. Rep. Serv. (Callaghan) 85, 91 (1974) (same) Seely v. White Motor Co., 63 Cal. 2d 9, 14, 403 P.2d 145, 148, 45 Cal. Rptr. 17, 20, 2 U.C.C. Rep. Serv. (Callaghan) 915, 918 (1965) (same); Jacobs v. Metro Chrysler-Plymouth, Inc., 125 Ga. App. 462, 467, 188 S.E.2d 250, 253, 10 U.C.C. Rep. Serv. (Callaghan) 771, 776 (1972) (same); Givan v. Mack Truck, Inc., 569 S.W.2d 243, 247 (Mo. App. 1978) (same); Ford Motor Co. v. Puskar, 394 S.W.2d 1, 14 (Tex. Civ. App. 1965) (same), *modified on other grounds*, 417 S.W.2d 262 (Tex. 1967).

88. 77 C.J.S. *Sales* § 340 (1952); *see* Schroeder v. Fageol Motors, Inc., 12 Wash. App. 161, 165, 528 P.2d 992, 995 (1974) (and cases cited therein), *rev'd in part on other grounds*, 86 Wash. 2d 256, 544 P.2d 20 (1975); Kure v. Chevrolet Motor Div., 581 P.2d 603, 608 (Wyo. 1978)

not tinker indefinitely, he is probably permitted to tinker for a reasonable time without being in breach. Thus, the seller is not in breach during the time before the reasonable repair period has elapsed, including the time before the seller has been notified of a defect. Although these cases do not address the question of when the statute of limitations begins to run, they do establish the date of breach. Because the date of breach is the date at which the limitations period begins under section 2-725,[89] under these cases the statute of limitations would begin to run on the date of failure to repair.

II. THE POLICY CONSIDERATIONS OF A SENSIBLE ACTION ACCRUAL DATE FOR REPAIR WARRANTIES

In order to arrive at a sensible solution to the problem of when an action accrues for repair warranties, it is necessary to consider important policies furthered by applying a failure-to-repair rule to such warranties. It is also necessary to examine the objectives of the on-delivery rule and determine whether this rule serves those objectives in the context of repair warranties.

A. Policies Served by a Failure-to-Repair Rule

Two policies are served by application of a failure-to-repair rule to repair provisions: such a rule allows the limitations period to begin only when the seller has breached its obligation; and such a rule gives a repair provision prospective treatment in a manner consistent with the purpose of the Code's future performance exception.

1. Under a Failure-to-Repair Rule an Action Accrues Only When the Buyer May Sue for Failure to Repair— A failure-to-repair rule would be in accord with the sensible and almost universal principle that the statute of limitations begins to run only when the aggrieved party has the present right to sue.[90] A repair provision requires the

---

(and authorities cited therein). It is also well established that "if the contract so stipulates, the seller's liability . . . does not attach until he has had an opportunity to remedy defects, and where such opportunity is afforded him his failure or refusal fixes his liability." 77 C.J.S. *Sales* § 340 (1952). *Accord* General Motors Corp. v. Halco Instruments, Inc., 124 Ga. App. 630, 635, 185 S.E.2d 619, 622 (1971); Russo v. Hilltop Lincoln-Mercury, 479 S.W.2d 211, 212-13 (Mo. App. 1972); Hole v. General Motors Corp., 83 A.D.2d 715, 717, 442 N.Y.S.2d 638, 640 (1981); *see also* 54 C.J.S. *Limitations of Actions* § 136 (1948 & Supp. 1983) (where warranty relates to future event, action does not accrue until occurrence of that event); Au v. Au, 63 Hawaii 210, 219, 626 P.2d 173, 180 (1981) (same); Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981) (same).

89. *See supra* text accompanying note 36.

90. *See* Ballwin Plaza Corp. v. H.B. Deal Constr. Co., 462 S.W.2d 687, 690 (Mo. 1971); Continental Casualty Co. v. Grabe Brick Co., 1 Ariz. App. 214, 217, 401 P.2d 168, 171 (1965)

seller (expressly or by implication) to repair only when a defect in the goods appears. Unlike the seller who warrants that the goods are currently free from defects, the seller who promises to repair has no obligation unless and until a defect manifests itself. As a result, the buyer cannot sue until the seller has attempted to repair after the appearance of any defect.[91] Hence, the limitations period should not begin until the seller's attempt to repair has been unsuccessful.

It might be objected that the Code drafters decided to apply an on-delivery rule in many cases in which the plaintiff has not suffered discernible damage at delivery. Code section 2-725(2) emphasizes this possibility by providing that the action accrues "when the breach occurs, regardless of the aggrieved party's knowledge of the breach."[92] Nonetheless, this language does not require that an action for breach of a repair promise accrue at delivery. Because the seller has no repair obligation at delivery, no breach of the repair promise, known or unknown to the buyer, can occur at delivery.[93] Thus, the action should not be held to accrue at delivery.

(quoting 1 C.J.S. *Actions* § 124(a) (1936); Amy v. City of Dubuque, 98 U.S. 470, 476 (1879)); Grand Island School Dist. No. 2 v. Celotex Corp., 203 Neb. 559, 562, 279 N.W.2d 603, 606 (1979) ("traditional rule"); Neal v. Laclede Gas Co., 517 S.W.2d 716, 718 (Mo. App. 1974); Gabriel v. Al habbal, 618 S.W.2d 894, 896 (Tex. Civ. App. 1981) (and cases cited therein) ("general rule of contract law"). Even if the purchaser's claim is characterized as a remedy, it is commonly accepted that "[w]here there is no present right to pursue [that] remedy against a party, but such right arises only on the doing of an act by him which puts him in default, the statute runs only from the default." 54 C.J.S. *Limitations of Actions* § 110 (1948).

91. "When the existence of an obligation is conditioned upon some event or contingency, the cause of action accrues when, and only when, such event or contingency happens unless by interference of one of the parties its happening is prevented." 1 C.J.S. *Actions* § 124(c) (1936). *See also* Ginn v. State Farm Mut. Auto. Ins. Co., 417 F.2d 119, 122 (5th Cir. 1969); Rogers v. Cowley, FED. SEC. L. REP. (CCH) ¶ 99,178, at 95,686 (N.D. Ga. 1983); Nicholson v. Nationwide Mut. Fire Ins. Co., 517 F. Supp. 1046, 1052 (N.D. Ga. 1981); Kaufman v. Albin, 447 A.2d 761, 763 (Del. Ch. 1982); Matchett v. Rose, 36 Ill. App. 3d 638, 648, 344 N.E.2d 770, 778 (1976); Kielb v. Couch, 149 N.J. Super. 522, 528-29, 374 A.2d 79, 82-83 (Law Div. 1977); John J. Kassner & Co. v. City of New York, 46 N.Y.2d 544, 550, 389 N.E.2d 99, 102, 415 N.Y.S.2d 785, 788 (1979); Bernstein v. Allstate Ins. Co., 56 Misc. 2d 341, 342, 288 N.Y.S.2d 646, 648 (1968); Pitts v. Wetzel, 498 S.W.2d 27, 28-29 (Tex. Civ. App. 1973); *cf.* U.C.C. § 3-122 & Off. Com. 1 (action accrual date for commercial paper). *But see* State Farm Mut. Ins. Co. v. Kilbreath, 419 So.2d 632, 633 (Fla. 1982), *rev'g* 401 So.2d 846 (Fla. Dist. Ct. App. 1981); Dillon v. Lintz, 582 S.W.2d 394, 395 (Tex. 1981), *rev'g* 568 S.W.2d 147 (Tex. Civ. App. 1978).

Unless the contingency, here the buyer's presentation of evidence of a defect to the seller, occurs, the buyer cannot establish the obligation that would make possible the breach essential to any contract claim. *See* Hodge v. Service Mach. Co., 438 F.2d 347, 349 (6th Cir. 1971). Moreoever, even after the repair obligation exists, the seller must fail to fulfill that obligation before the buyer's action accrues. *See, e.g.*, First Bank & Trust Co. v. Cannon, 164 Ga. App. 449, 451, 297 S.E.2d 349, 351 (1982) (contract claim arises only when contract breached); G.P. Enters., Inc. v. Adkins, 543 S.W.2d 913, 915 (Tex. Civ. App. 1976) (cause of action on contract only where there is a breach).

92. *See* U.C.C. § 2-725(2) (quoted *supra* note 3). Unlike the future performance exception and the on-delivery rule, this provision reaches the repair obligation under current law. *See supra* note 71.

93. Where the warranty contains no promise regarding defects or where the seller's obliga-

2. A Failure-to-Repair Rule is Consistent with the Purpose of the Section 2-725(2) Future Performance Exception— Regardless of the time at which the buyer may sue on a repair obligation, the purpose of the section 2-725(2) exception is to give prospective warranties prospective effect in the law of the statute of limitations.[94] Where a manufacturer promises to repair at the future time at which the goods are in need of repair, its promise is clearly as prospective as that of a manufacturer offering the typical prospective no-defects warranty — one that "promise[s] performance of the product not merely at the moment of purchase but at some future date as well."[95] While repair promises may not relate to the "product" in a fashion contemplated by the Code drafters,[96] such promises are "representation[s] that something will be done in the future," and, as such, cannot "be true or false at the time when [they are] made."[97] Thus, as does the prospective no-defects warranty, a promise to repair at a future time should receive the benefit of a statute of limitations that runs only after the

---

tion is expressly limited to repair, there is simply no duty of which the purchaser can allege a breach before failure to repair. *See* Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 984, 433 N.Y.S.2d 888, 889 (1980); *see also supra* notes 87-89 and accompanying text. While a buyer holding a no-defects warranty could at least theoretically assert an action for breach of warranty upon delivery — the defect (and thus damages) being present but not apparent — a buyer with only a right to repair hasn't a scintilla of present right to sue on the date of delivery.

Even where a nonexclusive repair obligation is accompanied by a no-defects provision, no breach of the no-defects provision of real legal consequence occurs before failure to repair since the means identified for enforcing the seller's promise are repair and replacement. *See* Dennin v. General Motors Corp., 78 Misc. 2d 451, 452, 357 N.Y.S.2d 668, 670 (N.Y. Sup. Ct. 1974). Clearly where a dual no-defects/repair warranty is construed as giving the buyer no more than a right to repair, *see e.g.*, Hansen v. F.M.C. Corp., 32 U.C.C. Rep. Serv. (Callaghan) 828, 832-33 (D. Kan. 1981); Voth v. Chrysler Motors Corp., 218 Kan. 644, 647, 651-52, 545 P.2d 371, 374-75, 378 (1976); Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 671, 418 N.Y.S.2d 948, 949-50 (1979); Mountain Fuel Supply Co. v. Central Eng'g & Equip. Co., 611 P.2d 863, 865, 871 (Wyo. 1980), even a theoretical breach at delivery should not be found. More importantly, though, no breach whatsoever of the *repair obligation* can occur at delivery because this obligation does not exist at delivery — it exists only in the event of a defect. Hence, the repair obligation may be given independent prospective treatment, especially where such obligation itself contains the time term. *See generally supra* note 41.

94. *See* Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1101 (N.D.N.Y. 1977) (§ 2-725(2) is consistent with pre-Code law that "[a] prospective warranty related to the future state of goods, and a cause of action for the breach of such a warranty accrued at the time the breach could have been discovered") (citations omitted). In addition, if the "performance of the goods" obstacle in § 2-725(2) is bypassed, repair provisions appear to be precisely within the language describing the second requirement of the exception — that is, such provisions are always of such a nature that "discovery of the breach must await the time of such performance." *See* U.C.C. § 2-725(2) (quoted *supra* note 3).

95. *See* J. WHITE & R. SUMMERS, *supra* note 5, at 420 (discussing Rempe v. General Elec. Co., 28 Conn. Supp. 160, 254 A.2d 577 (Super. Ct. 1969)).

96. *See supra* text accompanying notes 15-16. *But see supra* note 17.

97. *See* Hanover Modular Homes, Inc. v. Scottish Inns of Am., Inc., 443 F. Supp. 888, 892 (W.D. La. 1978).

seller's promise has actually been breached.[98]

Of course, if section 2-725's policy of giving prospective effect to prospective warranties is to have meaning in the case of repair warranties, the label attached to the repair promise cannot be allowed to determine when an action for breach of that promise is held to accrue. Regardless whether a repair promise is characterized as a remedy or as a warranty, it is a promise — a contractual obligation — to act in the future[99] that can be breached only in the future. To allow mere characterization of the repair promise as a remedy to prevent it from receiving its logically prospective construction[100] would constitute a return to the formalism[101] long abandoned by practical, modern law.[102]

---

98. Some courts have held that the statute of limitations is tolled while the seller attempts to repair the goods. *See, e.g.*, Little Rock School Dist. v. Celotex Corp., 264 Ark. 757, 757, 574 S.W.2d 669, 674 (1978); *see also* U.C.C. § 2-725(4). *See generally* Annot., 68 A.L.R.3d 1277 (1976). This, however, is not the predominating view. *See, e.g.*, Triangle Underwriters, Inc. v. Honeywell, Inc., 604 F.2d 737, 743 (2d Cir. 1979); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 819 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); K/F Dev. & Inv. Co. v. Williamson Crane & Dozer Corp., 367 So. 2d 1078, 1080 (Fla. Dist. Ct. App. 1979); Zahler v. Star Steel Co., 50 Mich. App. 386, 390, 213 N.W.2d 269, 270 (1973); *see also* Thalrose v. General Motors Corp., 8 U.C.C. Rep. Serv. (Callaghan) 1257, 1258 (N.Y. Sup. Ct. 1977) (cited in *Zahler* and *Triangle Underwriters*). Note, however, that the cases that hold that the statute of limitations is not tolled often involve simple warranties against defects that do not extend to future performance. Thus, breach is reasonably held to occur upon delivery. In any event, a jurisdiction willing to toll the statute of limitations during repairs, presumably because the buyer would not and could not sue during this period, might be receptive to the argument that the statute should not begin to run on a repair warranty until the seller has failed to repair.

99. *See* Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 998, 354 N.Y.S.2d 778, 784, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974) ("a promise to repair is an express warranty that the promise to repair will be honored") (citing Zoss v. Royal Chevrolet, Inc., 11 U.C.C. Rep. Serv. (Callaghan) 527, 532 (Ind. Super. Ct. 1972)), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975).

100. *See supra* notes 18, 23-30 and accompanying text; *see also supra* note 51.

101. The late Professor Karl Llewellyn, the "chief draftsman" of the Code (especially Articles One and Two), *see* J. WHITE & R. SUMMERS, *supra* note 5, at 4-6, roundly criticized the "Formal Style":

> Sense, the ways of men with words, the ways of businessmen in dealing, these are irrelevant and literally inadmissible: they do not get into the hall, to be heard or considered. Generations of law students were introduced to their profession by way of these strange ideas, and courts have in consequence made actual decisions in their image, sometimes with a touch of patent Parkeian pleasure as the pretty little puzzle-pieces lock together to leave for hundreds of good business promises no legal container but the garbage can.

K. LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 39 (1960).

102. Another important policy may be frustrated where these provisions are not given their intended effect in cases of warranties with a stated obligation period longer than four years. In such cases, if the delivery rule is applied, the purchaser may be denied the opportunity to redress a defect in the product during the portion of the period stated in the warranty that exceeds the limitations period. Under a five-year repair warranty, *e.g.*, *supra* note 4; *cf.* Shapiro v. Long Island Lighting Co., 71 A.D.2d 671, 418 N.Y.S.2d 948 (1979) (10-year warranty), once four years had passed, *see* U.C.C. § 2-725(2), the purchaser would be left with no means to enforce the warranty agreement. In effect, the purchaser would receive only four years of warranty protection. And because, under such warranties, the only cause of action available to such

B. Using the Failure-to-Repair Rule to Meet the Goals of the On-Delivery Rule

Three general purposes are thought to be served by an on-delivery rule:[103] it provides a fixed limit beyond which there can be no liability for breach of warranty; it protects manufacturers from unfounded suits; and it reflects the nature of the warranty as primarily promising a certain condition of the goods at delivery. These purposes, however, are best served in the context of nonprospective no-defects warranties, and are much less persuasive as justifications for an on-delivery rule in the case of repair warranties.

1. The Failure-to-Repair Rule Places a Time Limit on Suits— Application of a failure-to-repair rule to repair warranties would allow a seller to gain the certain knowledge as to the last possible date of suit[104]

---

a purchaser is an action claiming that the manufacturer has failed to repair as warranted, *see* Rochester Welding Supply Corp. v. Burroughs Corp., 78 A.D.2d 983, 984, 433 N.Y.S.2d 888, 889 (1980), the purchaser's action for breach of warranty would be time barred before he ever, in fact, had a cause of action.

Yet another undesirable consequence of application of the on-delivery rule is apparent where the parties have limited the statute of limitations by contract, as permitted under U.C.C. § 2-725(1). In the case of an agreement to limit the limitations period to one year, *see, e.g.*, Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 818 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979), if the purchaser fails to notify the manufacturer before the one year period has elapsed, the purchaser's cause of action for breach of warranty to repair is barred by the explicit statement in the warranty that the manufacturer's obligation exists only for a one year period. Assuming, however, that the defect manifested itself after 364 days, that the purchaser immediately notified the manufacturer of the defect, and that, at that point, the manufacturer refused to repair, under the on-delivery rule, the purchaser would have only one day to file suit. Even if the purchaser were allowed a reasonable period of time — perhaps a few weeks — after the manufacturer's failure to repair in which he might file suit, the result would be unfair. It is doubtful that the drafters of the Code and the legislatures of the states contemplated a limitations period of only days or weeks, even where the parties had expressly agreed to limit the limitations period to one year. If the parties have agreed to a one year limitations period, any reasonable ruling would allow the purchaser a full year during which he might file suit *after* the manufacturer has failed to fulfill his obligations, regardless of the date of delivery.

103. Statutes of limitations in general are often justified in terms of the legal system's need for fresh evidence. *See* Special Project, *supra* note 20, at 269 & n.1013 (citing 75 W. VA. L. REV. 201, 206 (1972); *Developments in the Law — Statutes of Limitations*, 63 HARV. L. REV. 1177, 1185 (1950)). This rationale should play no role where there is no evidence available at the early point at which breach might otherwise be held to occur. While an on-delivery rule furthers the fresh evidence policy in the case of a no-defects warranty, in the case of a suit for breach of warranty to repair, there is simply no evidence (not even undiscovered evidence, *see supra* note 93) available at the delivery date to show breach of the repair obligation. Similarly, the justification for statutes of limitations that plaintiffs should not be rewarded for "sleeping" on their rights, *see* Dincher v. Marlin Firearms Co., 198 F.2d 821, 823 (2d Cir. 1952); McCroskey v. Bryant Air Conditioning Co., 524 S.W.2d 487, 489 (Tenn. 1975), or protected from "ignorance" of their rights, *see* Brown v. Ellison, 304 N.W.2d 197, 201 (Iowa 1981); Krueger v. V.P. Christianson Silo Co., 206 Wis. 460, 240 N.W. 145, 146 (1932), is inapposite here.

104. *See* Jackson v. General Motors Corp., 223 Tenn. 12, 18, 441 S.W.2d 482, 484, *cert. denied*, 396 U.S. 942 (1969) (on-delivery rule prevents possibility that "there would never be a time that a suit could not be brought"); *cf.* J.. WHITE & R. SUMMERS, *supra* note 5, at 422

that a fixed limit[105] on-delivery rule would allow. If the seller offered a one year warranty, a failure-to-repair rule would require that the maximum period of potential liability be five years[106] — the one-year repair obligation period plus the four year limitations period. If a defect manifested itself on the last day of the twelfth month of the warranty and the purchaser brought the defect to the attention of the manufacturer on that day, at which point the manufacturer failed to repair, the purchaser could bring an action no more than four years later. As a result, there is no possibility of indefinite liability.[107]

2. A Failure-to-Repair Rule Would Not Subject Sellers to Increased Risk of Unfounded Suits— Although a policy of preventing unfounded suits[108] is not, on its face, unreasonable, a buyer holding a repair warranty is no more likely to pursue an unfounded claim than is a buyer holding an ordinary prospective no-defects warranty. While an on-delivery rule would protect a seller from unfounded suits brought more than four years after delivery, this policy argues for an early action accrual date in *any* case. If suits are to be barred because they are potentially unfounded, there is no reason to distinguish between repair warranties and warranties currently given prospective treatment under the Code. Moreover, to the extent that this argument assumes that many claims are spurious because the failure of the product is due to lack of proper product use or care[109] it is unpersuasive here; most warranties themselves disclaim any obligation to repair where product failure is caused by abuse, misuse, or lack of proper care.[110] Even where the warranty does not contain such a disclaimer, product failure due to abuse is most likely not within the terms of the usual repair warranty provision promising to repair products that fail due to a defect.[111]

3. Repair Provisions do not Warrant the Condition of the Goods at the Time of Delivery— An on-delivery rule that is ordinarily ap-

---

(both U.C.C. § 2-607 and statutes of limitations give the seller the "mind balm" of being able to close his books on the past at a given point); Standard Alliance Indus. v. Black Clawson Co., 587 F.2d 813, 820 (6th Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) (statutes of limitations allow seller to be free of "worry" after a certain point); BLACK'S LAW DICTIONARY 835 (5th ed. 1979) (statutes of limitation are statutes of "repose").

105. *See* Alris, Inc. v. Gojer, 75 Misc. 2d 962, 965, 349 N.Y.S.2d 948, 952 (1973); *accord* Raymond-Dravo-Langenfelder v. Microdot, Inc., 425 F. Supp. 614, 618 (D. Del. 1977); *see also* Centennial Ins. Co. v. General Elec. Co., 74 Mich. App. 169, 172, 253 N.W.2d 696, 697 (1977).

106. Of course, the maximum period during which a seller might be sued under any warranty, absent tolling, *see supra* note 98, is computed by adding the warranty period to the limitations period.

107. *See also supra* note 41.

108. *See, e.g.*, Mendel v. Pittsburgh Plate Glass Co., 25 N.Y.2d 340, 346, 253 N.E.2d 207, 210, 305 N.Y.S.2d 490, 495 (1969).

109. *Id.*

110. *See, e.g., supra* note 4.

111. *Id.*

plied "because the condition of the goods at the time of delivery is central"[112] is not sensibly applied to repair warranties. Because the seller warrants in the usual situation only that, at delivery, the goods will conform to specifications, an on-delivery rule may often be reasonable. The condition of the goods at delivery, however, is not central to the manufacturer's obligation under a repair warranty. Indeed, the presence of a repair provision indicates that the manufacturer recognizes the possibility that the goods may at some future point require repair — the warranty assumes that the condition of the goods may vary from that which is expected and warrants only that when such variation is apparent needed repairs will be made.[113] Hence, the objective of the on-delivery rule that the action accrual date should reflect the nature of the warranty in question is met where a failure-to-repair rule is applied to repair warranties.

III. A SUGGESTION FOR AMENDMENT OF CURRENT CODE LANGUAGE

Because repair warranties are of a prospective nature they should be accorded the same treatment in the law of the statute of limitations as that accorded prospective no-defects warranties under Code section 2-725(2)'s future performance exception. Nonetheless, the courts have given repair warranties such treatment only infrequently. The construction of repair provisions as remedy limitations significantly reduces the likelihood that such provisions will receive the benefit of a limitations period beginning only at the date of failure to repair.[114] Amendment of the current language of section 2-725 is one means of solving this problem.

A. The Proposed Amendment

The following amendment (proposed subsections (5), (6), (7), (8), and (9)) is suggested:

---

112. *See* Special Project, *supra* note 20, at 270. Two phrases in the § 2-725(2) language confirm the impression that the on-delivery rule exists for this reason. First, the subsection's first sentence states that the "cause of action accrues when the breach occurs regardless of the aggrieved party's *lack of knowledge of the breach*." U.C.C. § 2-725(2) (emphasis added). This language appears to be designed for the situation where the seller's promise relates to the state of the goods at the time of delivery and where a defect is not apparent at that time. Second, the future performance exception requires that "*discovery* of the breach must await the time of such performance . . ." *Id.* (emphasis added). This language also seems to contemplate a breach that occurs at delivery in the form of an undiscovered defect.

113. "Underlying the warranty to make needed repairs is the assumption that the goods may fall into disrepair or otherwise malfunction." Owens v. Patent Scaffolding Co., 77 Misc. 2d 992, 999, 354 N.Y.S.2d 778, 785, 14 U.C.C. Rep. Serv. (Callaghan) 610, 617 (1974), *rev'd on other grounds*, 50 A.D.2d 866, 376 N.Y.S.2d 948 (1975).

114. *See supra* notes 9-30 and accompanying text.

(5) A repair-replacement warranty, as defined in subsection (6) of this section, shall be construed as a warranty that explicitly extends to future performance of the goods for the purposes of subsection (2) of this section

(6) A repair-replacement warranty is a written promise made by the seller to the buyer containing both of the following terms:

(a) an explicit statement that the seller will repair or replace the goods in the event that a defect becomes apparent;

(b) an explicit statement of the time period, even if this period is a "lifetime" or is otherwise without limit, for which the seller's obligation to repair or replace exists.

(7) In the case of a repair-replacement warranty, as defined in subsection (6) of this section, including a warranty that also promises that the goods are not defective, discovery of the breach, for the purposes of subsection (2) of this section, shall not be found to have occurred until the seller failed to repair within a reasonable time after the seller received notice of the defect(s).

(8) The presence in a warranty of a promise that the goods are not defective shall not preclude construction of such warranty as a repair-replacement warranty under this section so long as the warranty satisfies the requirements of subsection (6) of this section.

(9) This section does not alter the law on warranties implied in law.

B. Commentary

This amendment[115] would establish that promises to repair for a

115. Two commentators have offered a proposal intended to resolve the problem of the proper construction, under U.C.C. § 2-725, of "future performance warranties" generally, including warranties of the product itself and warranties of title. *See* Schmitt & Hanko, *supra* note 7, at 331-32. This proposal expressly gives present treatment — applies the on-delivery rule — to those warranties that would qualify as "warranties of description" under § 2-313(1)(b) or "warranties of conformity" under § 2-313(1)(c). *Id.* at 331. Prospective treatment under the Schmitt-Hanko (S-H) proposal would be reserved for "express warrant[ies] by promise or affirmation (2-313(1)(a))." *Id.* The most important difference between the S-H proposal and the amendment offered here is that, given the prevailing construction of repair provisions as remedy limitations that cannot extend to future performance of the goods, *see supra* notes 18-30 and accompanying text, such provisions could not themselves be given prospective treatment under the S-H proposal. Repair provisions would be denied such treatment under the S-H proposal because they fail to relate, as required by the proposal's explicit reference to § 2-313(1)(a), to the "goods." *See supra* note 33 and accompanying text. Although the repair provision may be a "promise

specified period (incidental to a sale of goods) are warranties for the purposes of Code section 2-725(2). Thus, even though such promises would not "relate to the goods" in the section 2-313 sense,[116] the need to apply non-Code action accrual date law to repair promises[117] would be obviated. In addition, and of more consequence, the amendment would require that repair warranties be given prospective treatment under the subsection (2) future performance exception. This would have the effect of codifying the rule that breach occurs and the statute of limitations begins to run only upon the manufacturer's failure to repair or replace in accordance with its warranty.

A repair warranty that contained a promise that the goods were not defective would receive similar prospective treatment if that warranty also contained both a promise that the seller would repair the goods in the event of a defect and an explicit statement of the duration of this obligation. A term requiring repair warranties containing promises that the goods are not defective to state that repair is the seller's sole obligation is not included because such a requirement is thought to be too restrictive.[118]

Subsection (7) would make it clear that buyers holding repair warranties have a reasonable period of time to secure repairs during which

---

or affirmation" as required by § 2-313(1)(a) and the S-H proposal, it does not relate to the goods and cannot, therefore, be a "warranty" — a promise that the "goods shall conform." *See* U.C.C. § 2-313(1)(a).

A second difference is that the S-H proposal would apply a discovery-of-defect rule to warranties it reached — the limitations period would begin when the purchaser discovered the defect. *See* Schmitt & Hanko at 331. The amendment offered here would allow the action to accrue on a repair warranty only upon the manufacturer's failure to repair.

Finally, the S-H proposal would give many *implied* warranties prospective treatment. *Id.* The amendment proposed here does not abandon the sensible view that a manufacturer should not be held to a delayed limitations period where it has not promised future performance. *See supra* note 5. The S-H proposal's drafters have attempted to prevent the inadvertent creation of implied warranties that would receive prospective treatment by including a term stating that "[n]othing in this section affects the right to exclusion or modification of warranties (2-316)." *See* Schmitt and Hanko at 331. This attempt will fail, however, in many situations. The Magnuson-Moss Warranty Act, enacted one year after the S-H proposal was offered, prohibits disclaimers of many implied warranties where a supplier of a consumer product offers any express warranty. *See* 15 U.S.C. § 2308(a) (1982). Thus, if the manufacturer offered a warranty — even an intentionally nonprospective no-defects warranty — its disclaimer of implied warranty would be invalid and any warranties implied in law would often be treated as prospective. Ironically, because, unlike the Code, the Magnuson-Moss Act makes repair provisions warranties, *see supra* note 35, a manufacturer that offered a repair provision would often also effectively offer a prospective implied warranty. This would not be because the repair provision was a remedy limitation for the implied warranty. (Often this cannot be the case. *See supra* note 19.) The action accrual date would be later than delivery only because legally required implied warranties would receive prospective treatment under the S-H proposal. Nevertheless, the repair provision itself would not receive prospective treatment. Thus, a later-than-delivery action accrual date would be used only because of the proposal's questionable inclusion of implied warranties in the group of warranties that would receive prospective treatment.

116. *See supra* notes 32-33 and accompanying text.

117. *See supra* notes 64-71 and accompanying text.

118. *See supra* note 2 and accompanying text.

the statute would not run.[119] Under subsection (9), there would be no change in the sensible current rule that an implied warranty cannot receive prospective treatment.[120]

By way of this amendment, the parties' reasonable expectations that no breach could occur unless and until the seller failed to repair, and that the statute of limitations for the purchaser's action on the warranty could not begin to run before this point, would not be disappointed.[121]

CONCLUSION

Great uncertainty exists whether a given court will find that the limitations period for a repair warranty begins at the time of delivery or only after the purchaser's attempt to secure repairs has been unsuccessful. Courts applying the Code to repair warranties have reached conflicting results based on generally unsatisfactory analysis. Courts looking beyond the language of the Code have held that breach of a repair warranty — and consequently the triggering of the statute of limitations — can occur only after the manufacturer has failed to repair. Policy considerations support the results reached by these courts, and argue for an amendment to Code section 2-725 that at once recognizes

---

119. Some jurisdictions currently toll the statute of limitations during repairs. *See supra* note 98. Current subsection (4) of U.C.C. § 2-725 acknowledges this fact, providing in part: "This section [§ 2-725 as a whole] does not alter the law on tolling of the statute of limitations . . ." U.C.C. § 2-725(4). In a jurisdiction that tolled the statute during repairs, of course, the proposed changes would eliminate only the time between delivery and the initiation of repair efforts from the computation of the breach-to-suit period. In a jurisdiction that did not toll the statute during repairs, any ruling that would require the inclusion of the repair period in the computation of the breach-to-suit period would not apply to repair-replacement warranties. In any case, there would be no actual inconsistency between the proposed changes and subsection (4) because the proposed changes do not *toll* the statute. The statute would not run for *any* period before failure to repair.

120. *See supra* note 5.

121. It is possible that some manufacturers would be discouraged from providing repair provisions if a failure-to-repair rule were applied to such provisions. Three considerations, however, make this seem less likely than one might suppose. First, a failure-to-repair rule would lengthen not the period of the manufacturer's obligation to repair, but only the period during which the manufacturer might be sued for failure to fulfill its warranty obligations. Second, under almost any theory as to why warranties take the form they do, the manufacturer has an economic incentive to provide the written warranty terms it specifies, including repair provisions. *See generally* Priest, *supra* note 2. Where the manufacturer intends the repair provision to limit its obligation to the buyer in the event of defect to a specified time period, *see* U.C.C. § 2-719(1)(a); *see also, e.g., supra* note 4 (faucet warranty limited to replacement), it may consider a failure-to-repair rule an acceptable exchange. Finally, a seller may *prefer* in some cases to avoid a finding of breach at delivery. If, for instance, a repair provision is found not to be exclusive, *see, e.g.*, U.C.C. § 2-719(1)(b), (3) (insufficiently "express" or "unconscionable"), the seller may be liable for incidental and consequential damages from the date of delivery. A failure-to-repair rule would protect the seller from liability for damages occurring between the delivery date and the date of failure to repair.

the differences between repair warranties and no-defects warranties and satisfies the need for uniform treatment[122] in this unsettled area.

—*Carey A. DeWitt*

122. *See* U.C.C. § 2-725, Official Comment (purposes).